

surgeries on his left knee. He stopped work on August 18, 1982 and returned to limited-duty employment at the employing establishment until 1987.¹ The Office returned appellant to the periodic rolls on August 22, 1987.

In a decision dated July 30, 1992, the Office reduced appellant's compensation, finding that his actual earnings as a pumping station operator effective April 27, 1992, fairly and reasonably represented his wage-earning capacity. By decision dated October 8, 1997, the Office found that he had no loss of wage-earning capacity based on his actual earnings as a pumping station operator effective October 12, 1997, fairly and reasonably represented his wage-earning capacity.

In a report dated March 9, 2000, Dr. Bong S. Lee, a Board-certified orthopedic surgeon and appellant's attending physician, noted that he had treated appellant since August 1982. He stated:

“[Appellant] has undergone a number of surgeries on his left knee. He has been wearing a knee brace. Because of this bad left knee, he has been putting a lot more pressure on his right knee. [Appellant] developed symptoms several years ago in the right knee, which have gradually worsened. As a matter of fact, at the present time his right knee is much more symptomatic than the left.”

Dr. Lee related that an x-ray of appellant's right knee showed “advancing arthritis of all three compartments of the knee, including the patellofemoral joint.” He stated: “This right knee problem is associated with the initial injury to the left knee, which has been an ongoing condition.” Dr. Lee referred appellant to Dr. Vincent DiStefano, a Board-certified orthopedic surgeon, for right knee surgery.

In a report dated April 4, 2000, Dr. DiStefano noted appellant's history of “long-standing complaints related to his right knee” made worse with walking and standing. He recommended a total joint replacement of the right knee.

An Office medical adviser reviewed the medical reports and recommended a second opinion evaluation regarding the cause of the right knee condition.

On June 14, 2000 the Office referred appellant to Dr. Steven J. Valentino, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion evaluation. In a report dated July 12, 2000, he reviewed the evidence of record and listed findings on physical examination. Dr. Valentino diagnosed resolved aggravation of osteochondritis dissecans of the left knee and foot, resolved traumatic arthritis of the left knee, resolved effusion and recurrent synovitis of the left knee and nonemployment-related degenerative arthritis of the right knee. He opined that appellant's 1982 employment injury did not cause or contribute to his right knee arthritis.

¹ By decision dated October 14, 1986, the Office issued appellant a schedule award for a 22 percent impairment of the left leg. He subsequently received an additional schedule award for his left leg.

In a decision dated September 5, 2000, the Office denied appellant's request for surgical authorization for a right total knee replacement on the grounds that he failed to establish that it was casually related to his August 18, 1982 employment injury.

In a progress report dated September 11, 2000, Dr. Lee stated: "In my opinion, [appellant's] right knee symptoms were initiated by his putting more weight on that side to compensate for the left knee problems. The degeneration of the right knee rapidly accelerated due to his increased weight-bearing pressure over the years."

On September 18, 2000 appellant requested a hearing on his claim. On October 4, 2000 he underwent a total arthroplasty of the right knee.

In a decision dated May 8, 2001, the hearing representative set aside the Office's September 5, 2000 decision finding a conflict in medical opinion between Dr. Lee and Dr. Valentino regarding whether appellant's right knee condition was a consequence of his August 18, 1982 employment injury. The hearing representative instructed the Office to refer appellant for an impartial medical examination.²

On July 17, 2001 the Office referred appellant to Dr. Paul L. Liebert, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated November 12, 2001, the physician described appellant's history of injury and medical treatment. He reviewed the evidence of record and listed detailed findings on physical examination.³ Dr. Liebert noted that x-rays from 1987 to 1990 showed degeneration of the right knee, but stated that he disagreed with Dr. Lee "that there could be any causality between [the] development of osteoarthritis and 'increased stress' secondary to an altered gain pattern for whatever reason." He stated:

"It can be argued that *once* [appellant] *developed* arthritis in his right knee, irrespective of causal relationship, ongoing favoring of his symptomatic left knee especially while working in any job that required frequent walking, climbing, standing or use of the right lower extremity might aggravate this underlying condition. As I was not provided with a detailed job description of [appellant's] municipal position, I cannot comment on the likelihood of this being a definite aggravating factor. However, it seems reasonable from [his] brief description that this particular job might have played an aggravating role in his eventual need for a right total knee replacement." (Emphasis in the original.)

² The hearing representative also instructed the Office to obtain an opinion from the impartial medical specialist regarding whether appellant sustained a low back condition due to his August 18, 1982 employment injury and whether he required surgery on his left knee.

³ Dr. Liebert opined that appellant continued to have an aggravation of degenerative joint disease of the left knee due to his August 18, 1982 employment injury and might require a total left knee replacement in the future. He further found that appellant's low back pain was "an exacerbation of underlying degenerative disc disease that can occur secondary to altered gain, which could reasonably have been secondary to his ongoing left knee symptoms and multiple surgeries."

By decision dated November 29, 2001, the Office denied medical treatment for appellant's right knee condition, finding that the evidence established that his right knee condition was not causally related to his accepted left knee condition.⁴

On December 3, 2001 appellant, through his representative, requested a hearing. A hearing was held on May 14, 2002.

By decision dated August 6, 2002, the hearing representative set aside the November 29, 2001 decision on the grounds that Dr. Liebert's opinion was equivocal and not fully rationalized. The hearing representative instructed the Office to provide the physician with a copy of appellant's municipal job description and to obtain a reasoned opinion regarding whether "ongoing favoring of the employment-related left knee, while performing the duties of the municipal position or while simply performing regular day-to-day activities, materially aggravated the right knee arthritis contributing to the eventual need for a right total knee replacement."

By letter dated August 14, 2002, the Office enclosed appellant's nonfederal job description and requested that Dr. Liebert provide a reasoned report regarding causation of the right knee condition in accordance with the hearing representative's instructions.

In a supplemental report dated October 16, 2002, Dr. Liebert noted that x-rays obtained on appellant's right knee on December 18, 1987 showed no arthritis, but that x-rays obtained on May 9, 2000 showed "moderately advanced tricompartmental osteoarthritis." He noted that appellant's right knee symptoms began in 1987. Dr. Liebert stated that he had reviewed appellant's position description and opined that it had "no material bearing on his development of right knee osteoarthritis." He stated:

"Osteoarthritis is a progressive condition and there is nothing in the mainstream orthopedic literature that this examiner is acquainted with which firms any causal relationship between onset of osteoarthritis in a weight-bearing joint and activities such as reflected in the [j]ob [a]nalysis or day-to-day activity. Although it can be argued that an underlying arthritic condition can be made worse with increased favoring of an opposite extremity, it is not the case with regards to [appellant]. It is clear that the 1987 x-rays, which I reviewed personally, did not reveal any arthritis and that within a reasonable degree of medical certainty, this condition developed independent of any left knee injury [appellant] sustained as a result of the 1982 injury."

By decision dated December 6, 2002, the Office denied appellant's claim for medical benefits for treatment of the right knee and his right total knee replacement on the grounds that the weight of the medical evidence established that it was not causally related to his accepted left knee condition.

⁴ The Office accepted that appellant sustained low back strain due to his left knee condition which had ceased and further authorized a total joint replacement of the left knee.

On December 9, 2002 appellant, through his attorney, requested a hearing and a subpoena of Dr. Liebert. The hearing representative denied the request for the subpoena on June 6, 2003. Appellant's attorney, on June 23, 2003 submitted a portion of another hearing transcript and argued that it showed that Dr. Liebert did not understand the Office's standard for causal relationship. On June 17, 2003 the attorney requested that the hearing be changed to a review of the written record.

By decision dated September 15, 2003, the hearing representative affirmed the Office's December 6, 2002 decision.

LEGAL PRECEDENT -- ISSUE 1

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.⁵

ANALYSIS -- ISSUE 1

The Office properly determined that a conflict existed between appellant's physician, Dr. Lee, who found that appellant had a right knee condition that required a total knee replacement as a consequence of his August 18, 1982 employment injury and the Office referral physician, Dr. Valentino, who found that appellant had degenerative arthritis of the right knee which was not employment related. The Office referred appellant to Dr. Liebert, a Board-certified orthopedic surgeon, for resolution of the conflict.⁶

Where there exists a conflict in medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, is entitled to special weight.⁷

Dr. Liebert provided a history of appellant's condition, listed detailed findings on examination and reviewed the medical evidence of record. In a report dated November 12, 2001, he opined that he disagreed with appellant's physician, Dr. Lee, that an altered gait could cause osteoarthritis. He noted that, after the development of osteoarthritis, appellant's "favoring of his symptomatic left knee especially while working" could aggravate his condition. Upon an inquiry by the Office, requesting clarification of his opinion, however, Dr. Liebert opined that

⁵ *Carlos A. Marrero*, 50 ECAB 117, 120 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2000).

⁶ Section 8123(a) of the Federal Employees, Compensation Act provides, in pertinent part, "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

⁷ *Rosie E. Garner*, 48 ECAB 220 (1996).

appellant's arthritic condition was not "made worse with increased favoring of an opposite extremity...." He reviewed the x-rays of appellant's right knee from 1987 to 2000 and stated:

"It is clear that the 1987 x-rays, which I reviewed personally, did not reveal any arthritis and that to within a reasonable degree of medical certainty, this condition developed independent of any left knee injury that [appellant] sustained as a result of the 1982 injury."

The Board finds that the opinion of Dr. Liebert is based on a proper factual and medical history, is well rationalized and supports that appellant's right knee condition was not caused or aggravated by his accepted left knee injury. Dr. Liebert accurately summarized the relevant medical evidence and provided detailed findings on physical examination. Moreover, the physician provided a proper analysis of his findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.⁸ Dr. Liebert provided rationale for his opinion by explaining that appellant's x-rays revealed that his osteoarthritis developed independently from his left knee condition. As Dr. Liebert provided a detailed and well-rationalized report based on a proper factual and medical background, his opinion is entitled to the special weight accorded an impartial medical specialist and establishes that appellant did not sustain a consequential injury to his right knee due to his accepted left knee injury. Therefore, appellant is not entitled to reimbursement for expenses due to his total right knee replacement.⁹

On appeal appellant's attorney contends that the Office failed to provide Dr. Liebert with the appropriate causation standard. He also argued that Dr. Liebert did not address whether appellant's right knee condition was made worse by his left knee injury.¹⁰ In its August 14, 2002 letter to Dr. Liebert, the Office requested that he address whether appellant's favoring of his left knee "materially aggravated" his right knee arthritis. Dr. Liebert specifically found that appellant's favoring of his left leg did not worsen the arthritic condition of his right knee. His report, therefore, is sufficient to show that appellant's right knee arthritis did not develop as a natural consequence of his employment injury to his left knee.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles.¹¹ This provision gives the Office discretion to grant or reject requests for subpoenas. The

⁸ See *Melvina Jackson*, 38 ECAB 443 (1987).

⁹ The Office is only required to pay for treatment of employment-related conditions. *Beverly J. Duffy*, 48 ECAB 1569 (1997).

¹⁰ Appellant's attorney submitted evidence of a hearing transcript from another case in which Dr. Liebert questioned the causation standard. In this case, Dr. Liebert found that appellant's altered gait caused no aggravation of his right knee condition.

¹¹ 5 U.S.C. § 8126.

Office regulation states that subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.¹²

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena “is the best method or opportunity to obtain such evidence because there is no other means by which, the testimony could have been obtained.”¹³ The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.¹⁴

ANALYSIS -- ISSUE 2

By letter dated December 9, 2002, appellant’s attorney requested that the Office hearing representative issue a subpoena to compel Dr. Liebert to testify “in order to conduct cross-examination with respect to the unfavorable determination in this case.” The Office hearing representative denied the request because the attorney had not explained why a subpoena was the best method to obtain the evidence and why the testimony was needed, given that Dr. Liebert had provided medical reports to the Office. In this case, appellant did not provide any explanation for his request for a subpoena or show why Dr. Liebert’s testimony was the best way to ascertain the facts, particularly in view of the fact that he provided two comprehensive reports to the Office. The Board, therefore, finds that the Office hearing representative acted within his discretion in not issuing a subpoena to Dr. Liebert as requested by appellant.

CONCLUSION

The Board finds that appellant has not established that he sustained a consequential right knee condition due to his August 18, 1982 employment injury. The Board further finds that the Office properly denied appellant’s request for a subpoena.

¹² 20 C.F.R. § 10.619.

¹³ *Id.*

¹⁴ *Martha A. McConnell*, 50 ECAB 128 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 15, 2003 and December 6, 2002 are affirmed.

Issued: July 6, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member